

# DEWEY & LeBOEUF

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July 22, 2008

## **BY ELECTRONIC FILING**

Marlene H. Dortch, Secretary  
Federal Communications Commission  
445 12th Street, SW  
Washington, DC 20554

Re: MB Docket No. 07-42  
***EX PARTE***

Dear Ms. Dortch:

On July 21, 2008, Mark Cuban of HDNet LLC, a member of the National Association of Independent Networks (“NAIN”), spoke with Chairman Marin. Mr. Cuban briefly discussed the importance of developing a “shot clock” and other carriage complaint reforms as discussed in HDNet’s June 5 ex parte under MB Docket No. 07-42. Mr. Cuban and Chairman Martin also discussed congressional interest in making progress with those reforms, as indicated by the attached letters.

Respectfully submitted,

*/s/ David S. Turetsky*

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*Counsel to HDNet LLC*

July 22, 2008

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cc: Chairman Kevin Martin  
Elizabeth Andrion

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CHAIRMAN, DEMOCRATIC POLICY COMMITTEE

# United States Senate

WASHINGTON, DC 20510-3405

June 13, 2008

The Honorable Kevin J. Martin  
Chairman  
Federal Communications Commission  
445 12th Street SW  
Washington, DC 20554

Dear Chairman Martin:

I write to you today to discuss timelines for consideration of items at the FCC. I worry that while the FCC has a shot clock for consideration of forbearance petitions, in a separate area of programming discrimination, the Commission lacks any type of timeline.

I have written to you in the past about the issue of forbearance and maintain the same concern over the Qwest forbearance petitions as I had with the Verizon petitions. Petitions should only be granted if it is clear that there will be a competitive environment following the forbearance. I worry that with these Qwest petitions, there is not enough competition and the FCC's actions may eliminate service by smaller companies who actually are competing with the incumbents. The Commission must take the time to carefully evaluate each market and yet for this crucial decision, the FCC has a required deadline.

However, for the consideration of discrimination complaints concerning programming, there is no timeline for Commission action. As you may know, I have sent a letter to the GAO requesting that they study the decrease in independent programming carried on television and radio. I think we need to work to protect the few independent programmers that exist from possible discrimination. It is at least important that they receive timely responses from the Commission when they file complaints. I hope the Commission will consider adopting a timeline for FCC response and resolution.

Thank you for your careful consideration.

Sincerely,



Byron L. Dorgan  
U.S. Senator

cc:

Michael J. Copps, Commissioner  
Jonathan S. Adelstein, Commissioner  
Deborah T. Tate, Commissioner  
Robert M. McDowell, Commissioner

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# United States Senate

COMMITTEE ON THE JUDICIARY

WASHINGTON, DC 20510-6275

June 23, 2008

The Honorable Kevin Martin  
Chairman  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554

Dear Chairman Martin:

I am writing to you regarding an issue of long standing concern to me as Chairman of the Subcommittee on Antitrust, Competition Policy and Consumer Rights – the ability of independent programmers to gain carriage on reasonable and nondiscriminatory terms on cable and satellite television. I have long believed that it is vitally important that independent programming channels are offered to the American public, rather than just programming affiliated with the major cable, satellite or broadcast television companies. Our democracy depends on the ability of independent voices to be heard, and increasing the diversity and variety of points of view available on television should be an important objective of both competition and communications policy. For this reason, I have strongly supported the FCC's program carriage rules and the principle that independent programmers gain access to cable and satellite systems (otherwise known as multi-channel video distributors or "MVPD") on reasonable and nondiscriminatory terms.

In 2005, the Antitrust Subcommittee held a hearing on the challenges faced by independent programmers in gaining carriage. An independent programmer witness, the America Channel, testified regarding the substantial difficulty that they had in getting carried on the major cable television systems. In the course of preparing for the hearing, the subcommittee heard from several other independent programmers who corroborated this testimony. More recently, members of the National Association of Independent Networks have told us of similar difficulties. Beyond getting carriage, these networks face what they believe is disparate treatment with respect to their channels being placed on the most expensive tiers with minimal distribution. These independent programmers believe that they are being discriminated against with respect to channel placement and conditions of carriage offered to programming channels affiliated with the MVPD companies. Additionally other large programmers, often but not always affiliated with MVPDs, bundle their channels together, tying less desirable channels to certain "must have" channels (such as national sports networks, for example). This bundling causes MVPDs to purchase unwanted channels and occupy limited channel capacity which they might otherwise use to carry channels offered by independent programmers.

I urge that the FCC take action to redress these barriers to independent programmers gaining carriage on cable and satellite systems. Especially important is that the program carriage rules be an effective and timely means for independent

programmers to seek redress. These rules currently mandate that independent programmers be treated fairly and on reasonable and nondiscriminatory terms in seeking carriage agreements, and further prohibit MVPDs from demanding equity interests in programming in return for carriage. However, independent programmers contend that these rules are ineffective as currently applied because program carriage complaints lack timetables, take years to adjudicate, and are governed by uncertain standards.

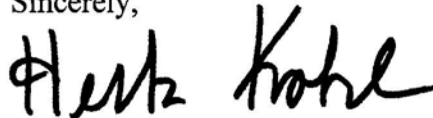
The FCC currently has a rulemaking pending, MB Docket 07-42, addressing these issues, and I urge that it be used to strengthen the program carriage rules and to simplify and make more efficient the process by which program carriage complaints are adjudicated. Specifically, I urge that the FCC set a deadline by which program carriage complaints by programmers be decided in prompt and reasonable time; provide a more certain definition as to what constitutes discrimination in program carriage disputes; provide a procedure for staying adverse action by an MVPD against an independent programmer (such as, for example, moving the independent programmer's channel to a disfavored or costly tier) while that independent programmer's discrimination complaint is being adjudicated; and enact any other rule the FCC believes necessary to strengthen program carriage requirements.

I also urge that the FCC take action on its tying/bundling rulemaking, MB Docket 07-29. Specifically, I urge the FCC to enact rules to prevent programmers affiliated with MVPDs or broadcast networks from unreasonably bundling channels together, when such bundling is done in order to deny independent programmers the channel capacity needed to be carried on MVPD systems.

In sum, I believe it is strongly in the interests of competition policy and the values of democracy and diversity of expression for independent programmers have a fair and equal opportunity to gain carriage on cable and satellite systems. I urge that you use these pending rulemakings to strengthen program carriage and tying/bundling rules so essential to giving independent programs this opportunity.

Thank you for your attention to this matter.

Sincerely,

A handwritten signature in black ink, appearing to read "Herb Kohl". The signature is fluid and cursive, with the first name "Herb" and last name "Kohl" clearly distinguishable.

---

HERB KOHL

Chairman, Subcommittee on  
Antitrust, Competition Policy  
and Consumer Rights

Cc: Commissioner Michael J. Copps  
Commissioner Jonathan S. Adelstein  
Commissioner Deborah Taylor Tate  
Commissioner Robert M. McDowell

**Congress of the United States**  
**House of Representatives**  
**Washington, DC 20515**

June 30, 2008

The Honorable Kevin Martin  
Chairman  
Federal Communications Commission  
445 12th Street, S.W.  
Washington, D.C. 20554-0001

Dear Chairman Martin:

We write to express concern about the challenges that independent programming networks face to secure distribution on cable and satellite in the current regulatory environment. A docket currently pending, MB Docket No. 07-42, will address a number of problems independent programming networks face by streamlining the carriage complaint rules and increasing their effectiveness and we request that the FCC move forward with action on the docket.

Given the extent to which the distributors themselves are owners of programming, it is important that independent programming networks have a fair opportunity to secure carriage agreements with multichannel video programming distributors (MVPDs), and are able to have carriage disputes quickly resolved. Consumers benefit from the choices and competition that independent networks provide. These networks can contribute to the diversity of voices that both the public and Congress value.

Regulatory policy should continue to ensure an avenue of distribution for media entrepreneurs to add to the diversity of voices the public can hear by building and continuing to operate these competing national networks. Opportunity for distribution should not be weighted more heavily toward major media corporations and vertically-integrated MVPDs.

Congress attempted to address these issues in the past, particularly in the 1992 Cable Act, however regulatory updates are necessary. In a competitive environment with vertically-integrated television companies, that law recognized that companies have an incentive and ability to seek a financial interest in programming, or to discriminate in the selection, conditions and terms of carriage, based on the affiliation or non-affiliation of a programmer. The current complaint process is not as efficient as it could be, and MB Docket No. 07-42 will address many shortcomings in the current process.

The absence of a strong, reliable complaint process has a significant impact on the marketplace. Independent programmers continue to leave the market, partly because entities that discriminate against independent programmers can do so with little risk. Private negotiations between independent programmers and distributors are likely more difficult, because the boundaries set by this law are less likely to be respected.

Accordingly, we urge you to provide more effective remedies and streamline the complaint process outlined through MB Docket No. 07-42. Specifically, we ask that the FCC consider adopting: (1) a 6 month "shot clock," i.e., a deadline for a final Commission determination measured from the filing of the complaint, whether related to alleged misconduct while on the platform, or to exclusion from it; (2) a better defined and more reasonable definition of a prima facie case, and a short timetable in the early part of the 6 months to address and resolve any challenges; (3) a definition of discrimination that includes retaliation; and (4) taking into account the relative bargaining positions of the parties, a requirement that the status quo before the challenged action be preserved until the complaint is decided under the newly adopted timeline, meaning that a programmer will not first be subjected to an allegedly discriminatory "re-tiering."

We appreciate that the Commission's attention to this matter, and urge you to move forward on MB Docket No. 07-42. Thank you in advance for your consideration of this request and we look forward to your response. Should you have any questions or require additional information, please do not hesitate to contact our offices.

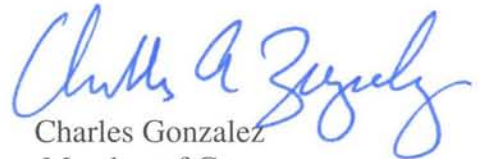
Sincerely,



Gene Green  
Member of Congress



Mike Doyle  
Member of Congress



Charles Gonzalez  
Member of Congress